

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Closed Captioning of Internet)	MB Docket No. 11-154
Protocol-Delivered Video Programming:)	
Implementation of the Twenty-First Century)	
Communications and Video Accessibility)	
Act of 2010)	

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION.

The National Association of Broadcasters (NAB)¹ hereby replies to the four additional comments submitted in this proceeding pertaining to the captioning of online video clips.² As NAB explained in its initial comments, broadcasters support the goals of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)³ and continue to voluntarily work to caption online video clips. The record supports NAB's position; indeed, all commenters agree that more online video clips, especially news, are being captioned.⁴ Broadcasters are committed to voluntarily investing significant resources to ensure that additional online video clips are captioned on a prospective basis.

¹ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

² Media Bureau Seeks Comment on Application of the IP Closed Captioning Rules to Video Clips, *Public Notice*, MB Docket No. 11-154 (rel. Dec. 13, 2013) (Public Notice).

³ Pub. L. No. 111-260, 124 Stat. 2751 (2010).

⁴ See Comments of DIRECTV, LLC, MB Docket No. 11-154 (Feb. 3, 2014) (DIRECTV Comments); Comments of the National Cable & Telecommunications Association, MB Docket No. 11-154 (Feb. 3, 2014) (NCTA Comments); Comments of the Digital Media Association, MB Docket No. 11-154 (Feb. 3, 2014) (DiMA Comments); Comments of Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.*, MB Docket No. 11-154 (Feb. 3, 2014) (TDI Comments).

In light of this record, the Commission should refrain from imposing additional regulatory requirements, particularly given express Congressional intent to exclude clips from online captioning requirements.

II. THE FCC HAS NO BASIS FOR REINTERPRETING CONGRESSIONAL INTENT REGARDING ONLINE VIDEO CLIPS.

As an initial matter, commenters generally agreed with NAB that the Commission lacks authority to mandate the captioning of online video clips.⁵ While TDI continues to argue that Congress meant for the CVAA to cover clips,⁶ NAB and other commenters have already refuted that claim. We incorporate our arguments by reference.⁷

The letter TDI cites from Senator Pryor and Senator Markey provides no basis for FCC authority.⁸ That letter is dated December 6, 2013, significantly after the CVAA was originally adopted. The Supreme Court has expressly found that post-enactment Congressional actions, deliberations and statements are entitled to little weight in interpreting statutory language.⁹ The Court of Appeals for the District of Columbia Circuit regards “[p]ost-enactment legislative history” as “oxymoronic”¹⁰ and has stated that “members of Congress have **no** power, once a statute has been passed, to alter its

⁵ See DIRECTV Comments at 1 (“It is worth noting at the outset that the Commission does not have the legal authority to require captioning of IP-delivered video clips.”); DiMA Comments at 4 (“contrary to the suggestion of the *IP Closed Captioning Order* and the *Public Notice*, the House and Senate committee reports did not give the Commission discretion to impose a captioning obligation on video clips. To the contrary, the reports direct the Commission not to impose a video clip captioning requirement.”) (emphasis in original); NCTA Comments at 7 (“the Commission’s authority under the CVAA does not extend to clips.”).

⁶ TDI Comments at 17-18.

⁷ See Comments of the National Association of Broadcasters at 11-14, MB Docket No. 11-154 (Feb. 3, 2014) (NAB Comments).

⁸ TDI Comments at 17.

⁹ See *Massachusetts v. EPA*, 127 S.Ct. 1438, 1460 & fn. 27 (2007).

¹⁰ *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005).

interpretation by post-hoc ‘explanations’ of what it means.”¹¹ Although legislative history “forms the background against which Congress adopt[s]” a law, “[p]ost-enactment statements are a different matter, and they are *not to be considered by an agency or a court as legislative history*.”¹²

If Congress wanted the Commission to require the captioning of clips it could — and would — have said so in the statute. But Congress did not do so, and instead stated in legislative history that it intended full-length programming, not video clips or outtakes, to be covered.¹³ We believe that the Commission’s original interpretation of Congressional intent regarding clips was correct and the Commission should not alter its course by asserting jurisdiction imposing a captioning regime for clips.

III. BROADCASTERS ARE VOLUNTARILY CAPTIONING MANY ONLINE VIDEO CLIPS AND THERE IS NO MARKET FAILURE FOR THE COMMISSION TO ADDRESS.

A. The Record Shows That Broadcasters Are Voluntarily Captioning An Ever-Increasing Amount Of Clips Despite Technological And Other Challenges.

The *Public Notice* in this proceeding asks whether individuals who are deaf and hard of hearing are being “denied access to critical areas of programming.”¹⁴ The record, including TDI’s survey, shows that the answer to that question is no. Captioning of news and information is widely available and becoming even more so. For example, in the limited time between TDI’s two reports, presenting data as of April 18, 2013 and November

¹¹ *Hazardous Waste Treatment Council v. U.S. EPA*, 886 F.2d 355, 365 (D.C. Cir. 1989) (emphasis added).

¹² *Id.* (emphasis added).

¹³ S. REP. NO. 111-386 at 13-14; H.R. REP. NO. 111-563 at 30.

¹⁴ Public Notice at 2.

30, 2013, respectively,¹⁵ the sampled online video news clips with captions rose from 23 percent to 54 percent.¹⁶ Since November 30, this number is likely to have increased.¹⁷

This impressive improvement in little more than six months demonstrates the commitment of broadcasters and other video programmers and distributors to increase the accessibility of their online video content, including news clips. NAB observes that the rapid growth in the captioning of online video news clips has occurred in the absence of any regulatory obligation and shows that any claims of market failure are erroneous.¹⁸ The Commission's expectation that the number of online video news clips with captions would increase has been proven correct.¹⁹

It also is important to recognize that captioning is not the only way to improve the accessibility of online video news content.²⁰ For example, especially with local news websites, online video clips are posted in conjunction with a news story or event before the news story is broadcast. The information available in the online video clip located on the

¹⁵ See TDI Comments; see Report on the State of Closed Captioning of Internet Protocol-Delivered Video Programming, Telecommunications for the Deaf and Hard of Hearing, Inc. at 2, MB Docket No. 11-154 (May 16, 2013) (Original TDI Survey).

¹⁶ See TDI Comments at V. As discussed below, NAB notes numerous flaws in TDI's surveys, including TDI's incorrect categorization of certain material (e.g., "web extras") as uncaptioned clips. Thus, TDI's survey may understate the true level of captioning of online video clips.

¹⁷ For example, as part of its coverage of the 2014 Winter Olympics in Sochi, Russia, NBCUniversal voluntarily captioned a substantial amount of IP-delivered programming. A majority of the short-form content (approximately 65%) that was taken either from the televised programming on NBCUniversal's various broadcast and cable networks or from the captioned Internet-only live streams was also captioned when made available online.

¹⁸ We also note that these impressive increases in video clip captioning occurred despite other CVAA obligations that have absorbed and will continue to absorb significant broadcaster time and resources. See NCTA Comments at 3 (showing the increasing availability of online video clips with captioning); see also NAB Comments at 4, 6-7.

¹⁹ See Public Notice at 2.

²⁰ The Commission previously identified the particular importance of enhancing the accessibility of news content. See Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-154, Report and Order, 27 FCC Rcd. 787, ¶ 48 (2012) (*IP Captioning Order*).

webpage is either written or summarized in text accompanying the clip. Deaf and hard of hearing individuals, or other consumers unable to access the video clip, can still read the information on the page.²¹

Broadcasters and other video programmers and distributors have enhanced and will continue to improve the accessibility of online video clips despite technological challenges.²² The Commission cannot assume that the mandate TDI seeks is either costless or simple. The record shows that creating captions for online video clips includes complicated workflow and technical issues, particularly because the captions on full-length programs cannot be reused and must be created anew when video clips are created.²³ As DiMA explains, this process is as difficult for a two minute clip as it is for a two hour movie, and is often more difficult because the captions must be excerpted and synchronized to the specific portion of the clip.²⁴ As the record shows, other variables further complicate the captioning of online video clips, including the differing accessibility capabilities among the various vendors broadcasters employ for their websites.²⁵

²¹ NCTA Comments at 8, fn. 8. See, e.g., *Dramatic Drops in Temperature Leaves Many Roads Icy*, NBCWashington.com, (Mar. 4, 2014) available at, <http://www.nbcwashington.com/news/local/DC-Area-Could-See-More-Snow-Mon.html> (last visited Mar. 4, 2014); *Spring Preview Coming This Week!*, TheDenverChannel.com (Mar. 4, 2014), available at <http://www.thedenverchannel.com/weather/forecast-parent/forecast/todays-forecast> (last visited Mar. 4, 2014). The Commission also must be careful to avoid unintended consequences. For example, any captioning requirements should not impact local stations' editorial decisions about the online posting, or timing of the posting, of content, including breaking news and weather information important to local communities.

²² NAB Comments at 4, 6-7.

²³ NCTA Comments at 5-6, NAB Comments at 6.

²⁴ DiMA Comments at 6. DiMA also observed that even determining which online video clips would be subject to a new captioning requirement could prove challenging because not all clips are televised, and thus, would not be covered by a new requirement. *Id.*

²⁵ For example, NDN, one of the biggest vendors in the country, is only now deploying an update to its software to enable captions for online video clips. See NAB Comments at 7.

For all these reasons, the Commission should refrain from mandating the captioning of all online video clips while technologies continue to develop. Broadcasters have made, and will continue to make, great progress in increasing the amount of captioned clips as technology improves.

B. The Commission Cannot Reverse Course On The Basis Of Flawed Data.

The Commission may not properly fashion a rule on the basis of TDI's sampling of online video clips because the report has many flaws that call into question its accuracy and reliability. TDI's claim that the parties could not tell the difference between program segments and video clips is not credible. Under the Commission's rules, segments are required to be captioned online to ensure that a few minutes are not cut from a televised program so as to avoid the captioning obligation.²⁶ The short video clips at issue here are only a small portion of any program, and should be discernible from much lengthier segments. For example, TDI includes a screen shot of a list of so-called "segments" from a cable program, *Fox and Friends*, but these "segments" combined total only approximately 11 minutes out of a four-hour program. That is hardly the majority of the program, and it appears misleading to suggest, as TDI does, that this example represents an abuse of the distinction between segments and clips to avoid captioning requirements.²⁷

TDI's survey is further flawed because TDI made no attempt: (1) to compare the online content with the programming that was actually aired to determine whether the online material constitutes a very substantial portion of the televised programming (i.e., are "segments"), and thus should have been captioned, or (2) to establish whether the content

²⁶ IP Captioning Order, ¶ 45.

²⁷ TDI Comments at 7.

in online video “clips” had actually ever been broadcast and thus, whether the online captioning rules have any applicability at all.

Similarly, TDI inaccurately refers to other online material as “clips” in an attempt to make its case that online video clips are being insufficiently captioned. For example, on page 8 of its survey TDI includes what it purports to be an example of an uncaptioned clip from an episode of the CBS news program *48 Hours*. In fact, the “clip” is a “web extra” – a short feature related to the program that was disseminated ONLY on the web, and that therefore would not need to be captioned even if the Commission were to require clips from televised programs to be captioned online.

TDI failed to determine whether this *48 Hours* clip and others it “reviewed” would ever have been required to be captioned. The failure to confirm whether an uncaptioned clip was subject to the rules by comparing the clip to the full program as broadcast undercuts TDI’s claims about the need for additional Commission mandates.²⁸ NAB notes that the webpage from which any viewer can access the full *48 Hours* program (which of course is captioned online), also has links to “related videos.” The “web extra” that TDI cited is one of those “related videos.” TDI could have compared the full program and the web extra simply by clicking on separate links from the *48 Hours* webpage.

These faults are likely to have infected TDI’s claim that purportedly only 18% of *non-news* clips have captions. TDI is unable to show whether the clips reviewed were promotional or other types of online-only clips, or whether the clips were from programming first aired on television with captions. It is also likely that if video clips from a

²⁸ NAB further notes that TDI’s criteria for selecting the clips it reviewed are ambiguous and unclear, including whether exempt content was included.

non-news program are online, then the entire non-news program is also available online with captions included.

In addition, TDI ignores certain technology issues that likely affected its review of the selected clips. Broadcasters use many vendors which manage each broadcaster's video players. Even if captions are delivered by a broadcaster, its vendor's network and video player and the consumer's technology all must function appropriately for captions to be displayed. Moreover, TDI's survey wholly ignores the January 1, 2014 apparatus deadline. The majority of clips in the survey were reviewed in late November 2013, but the apparatus requirements did not apply until the following year.²⁹ Thus, it is impossible to know whether TDI's reviewers were unable to access captioning due to player equipment problems wholly outside broadcasters' control.

Last, TDI asks the Commission to impose quality captioning obligations. This request is premature at best and would likely deter the placement of clips and other video online. As evidenced in the best practices adopted in CG Docket No. 05-231, broadcasters are committed to working with all stakeholders to improve caption quality on broadcast television.³⁰ These improved captions will in turn improve the overall quality of online video captions. The Commission must not act prematurely on IP caption quality. To do so would add significant complexity, expense and technical problems to an already challenging process.

²⁹ See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Order on Reconsideration and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 8785, ¶ 23 (2013).

³⁰ Closed Captioning of Video Programming, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 14-12, ¶¶ 60, 81 (2014). The Commission has also requested further comment on a host of captioning quality issues for television programming. *Id.* at ¶ 131.

C. If The Commission Nonetheless Imposes Additional Online Captioning Mandates, Any Affirmative Obligation Must Only Apply Prospectively.

Should the Commission decide, despite clear record evidence of increasing captioning of online clips, to adopt further mandates, any obligations must only apply prospectively. DiMA notes that broadcasters have millions of short online video clips in their archives,³¹ and creating captions for those clips, along with new clips, is infeasible. We agree. The Commission has previously recognized the complexities and challenges to identifying and adding captions to archived programming and content.³² These challenges are multiplied by the fact that each online clip would need to be compared to the full-length program to see if it had been broadcast; whether it contains or consists entirely of “user-generated content” outside of the rules; and whether it is a compilation of a variety of programs, or portions of the same program. Until an automated solution exists, captioning existing content remains time-consuming, resource intensive, and difficult.³³ Any requirement to caption archived video clips would likely result in removal of online clips. This would be contrary to the public interest.

IV. CONCLUSION

As the record makes clear, broadcasters are captioning more and more online video clips, completely voluntarily, and are committed to further increasing video clip captioning to improve accessibility. The Commission should refrain from new regulatory mandates and allow captioning technology to continue to develop consistent with Congressional intent. The viewing public is best served by all stakeholders working together voluntarily to address difficulties or problems.

³¹ DIMA Comments at 6.

³² See IP Closed Captioning Order, ¶ 33.

³³ NAB Comments at 6; NCTA Comments at 8.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, D.C. 20036
(202) 429-5430

A handwritten signature in black ink, appearing to read 'Jane E. Mago', written in a cursive style.

Jane E. Mago
Jerianne Timmerman
Ann West Bobeck
Justin L. Faulb
Kelly Williams

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